

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DENNIS F., CAROL F., GRACE F.,	)	Case No. 12-cv-02819-SC
MARK P., KESTREL P., MAURA T.,	)	
EDWARD T., EMILY T., ED L., and	)	ORDER DENYING MOTION FOR
MINDY L.,	)	<u>CLASS CERTIFICATION</u>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
AETNA LIFE INSURANCE,	)	
	)	
Defendant.	)	
	)	

---

**I. INTRODUCTION**

The above-captioned plaintiffs ("Plaintiffs") are adolescents with mental health conditions who sought care at residential treatment centers ("RTC(s)"), as well as their parents, who obtained health benefits plans that are insured or administered by Defendant Aetna Life Insurance ("Aetna").<sup>1</sup> Plaintiffs bring this putative class action against Aetna in connection with Aetna's

---

<sup>1</sup> Dennis F. and Carol F. are the parents of Grace F. ("Grace"). Mark P. is the father of Kestrel P. ("Kestrel"). Maura T. and Edward T. are the parents of Emily T. ("Emily"). Ed L. and Mindy L. are the parents of Mariah L. ("Mariah"), who is not a party to this action. The Court refers to Grace, Kestrel, Emily, and Mariah, collectively, as the "named patients."

1 denial of coverage for the named patients' treatment at RTCs.  
2 Plaintiffs allege that Aetna uses its Level of Care Assessment Tool  
3 ("LOCAT"), which consists of a one-page scoring form ("LOCAT  
4 Scoring Form") and a ten-page instruction manual ("LOCAT  
5 Guidelines"), to evaluate the medical necessity of the level of  
6 care for a patient's mental health treatment. Plaintiffs further  
7 allege that Aetna consistently did not follow the directions on the  
8 LOCAT Scoring Form when tabulating LOCAT scores. Plaintiffs bring  
9 two causes of action: (1) a claim for benefits under the Employee  
10 Retirement Income Security Act ("ERISA"), 29 U.S.C. 1132(a)(1)(B);  
11 and (2) a claim for declaratory and injunctive relief. Plaintiffs  
12 now move for certification of two putative classes, one under  
13 Federal Rule of Civil Procedure 23(b)(3) and the other under Rule  
14 23(b)(2). ECF No. 46 ("Mot."). The Motion is fully briefed, ECF  
15 Nos. 64 ("Opp'n"), 74 ("Reply"), and appropriate for resolution  
16 without oral argument per Civil Local Rule 7-1(b). For the reasons  
17 set forth below, Plaintiffs' motion for class certification is  
18 DENIED.

## 19 20 **II. BACKGROUND**

21 Plaintiffs are current and former members of employer-  
22 sponsored ERISA plans administered by Aetna. The specific terms of  
23 Plaintiffs' plans varied, but each plan provided coverage for  
24 residential treatment of behavioral health conditions if that  
25 treatment was "medically necessary." The plans also granted Aetna  
26 the discretion to interpret and determine what constitutes  
27 medically necessary services under the plan. Upon receiving a  
28 member's claim, Aetna conducts a review of the clinical

1 documentation and other information provided by the member's  
2 therapists and physicians to determine whether residential  
3 treatment is medically necessary.

4 The parties dispute LOCAT's role in medical necessity  
5 determinations. Plaintiffs characterize the LOCAT Scoring Form and  
6 Guidelines as governing plan documents, and they argue that Aetna's  
7 decision to deny coverage was based solely on their purported  
8 failure to meet LOCAT criteria. See Mot. at 6, Reply at 8. Aetna  
9 counters that LOCAT is merely a tool that Aetna clinicians use in  
10 making their medical necessity determinations, and that even if  
11 LOCAT does not suggest that the level of care sought is medically  
12 necessary, Aetna clinicians will exercise their independent  
13 clinical judgment to determine whether coverage should be allowed  
14 at the level requested. See Opp'n at 8.

15 The ten-page LOCAT Guidelines provide a scaffold of factors  
16 that Aetna clinicians should consider in making medical necessity  
17 determinations. Friedlander Decl. ¶ 23.<sup>2</sup> The LOCAT Guidelines are  
18 divided into five sections, which are referred to as dimensions:  
19 (I) acute dangerousness, (II) functional impairment, (III) mental  
20 status and comorbid factors, (IV) psychosocial factors, and (V)  
21 additional modifiers. Mot. Ex. 3 ("LOCAT Guidelines"). The  
22 dimensions are further divided into sub-dimensions, each of which  
23 contain a number of descriptors. Id. These descriptors function  
24 as a set of guidelines for determining where on the spectrum of  
25

---

26 <sup>2</sup> Dr. Mark Friedlander, Aetna's Chief Medical Officer for  
27 Behavioral Health, filed a declaration in opposition to the motion  
28 for class certification. ECF No. 70 ("Friedlander Decl.").  
Pursuant to a Court order, the exhibits to the declaration were  
filed under seal.

1 symptoms a member is presenting. Friedlander Decl. ¶ 24. The  
 2 descriptors are also associated with a numerical value or "score"  
 3 that represent the clinical presentation of the member and range  
 4 from least severe (a score of 1) to most severe (a score of 5).<sup>3</sup>  
 5 Id.

6 Plaintiffs do not challenge any aspect of the LOCAT  
 7 Guidelines. However, they do challenge Aetna's application of the  
 8 one-page LOCAT Scoring Form, which provides brief instructions on  
 9 tabulating a member's total LOCAT score. Plaintiffs argue that  
 10 Aetna consistently tabulated members' LOCAT scores in a manner  
 11 inconsistent with the instructions provided on the LOCAT Scoring  
 12 Form. Specifically, Plaintiffs argue that Aetna (1) applied an  
 13 incorrect method for tabulating the total scores for Dimensions III  
 14 and V, and (2) erroneously left a number of sub-dimensions blank.  
 15 With respect to the first argument, Aetna scored Dimension III as a  
 16 "1" if any score in its eight sub-dimensions was "3" or greater;  
 17 otherwise, Aetna scored Dimension III as "0." Plaintiffs contend  
 18 that the total score for Dimension III should be equivalent to the  
 19 sum of the scores for its eight sub-dimensions. The parties raise  
 20 a similar dispute concerning the tabulation of Dimension V.

21 <sup>3</sup> For example, the descriptors for the suicidal intent sub-  
 22 dimension of the acute dangerousness dimension are:

- 23 1. None: No elements of suicidality.
- 24 2. Minimal: Fleeting thoughts of suicide, but no plan,  
 intent or actions. . . .
- 25 3. Mild: Persistent thoughts of suicide with no  
 feasible plan and no definite intent.
- 26 4. Moderate: Suicidal plan and intent, but without  
 organized means to execute the plan. . . .
- 27 5. Severe: Patient has plan and intent to commit  
 suicide, plus the means to execute the plan. . . .

28 LOCAT Guidelines at 2.

1 Plaintiffs assert that Aetna's alleged errors resulted in lower  
2 LOCAT scores, and in some cases lower scores resulted in denials of  
3 coverage.

4 Based on these alleged tabulation errors, Plaintiffs seek  
5 certification of two subclasses. The first subclass is "comprised  
6 of those Aetna participants and beneficiaries who, had Aetna filled  
7 in the Scoring Form as required, would have qualified for  
8 reimbursement for inpatient residential treatment." Mot. at 7.  
9 Plaintiffs propose Emily and her parents as the class  
10 representatives for Subclass 1. Emily received treatment for her  
11 mental health conditions at a facility in Utah from January 19,  
12 2009 through June 18, 2010. FAC ¶ 5. Aetna covered the first ten  
13 days of Emily's RTC treatment, but denied coverage for the rest.  
14 Mot. Ex. 4. Aetna's denial letter explained:

15  
16 After review of the information received, the specific  
17 circumstances of this member[,] and the [LOCAT]  
18 Guidelines for Residential Treatment, coverage for the  
19 requested level of care is denied. The LOCAT  
20 guidelines include factors pertaining to the member's  
21 symptom intensity and intent and ability to comply  
22 with the treatment. The member's reported clinical  
23 condition as it relates to all these factors does not  
24 meet LOCAT guidelines for residential treatment.  
25 Treatment of this member could be provided at a lower  
26 level of care, or in another setting, e.g., partial  
27 hospitalization, intensive outpatient, or routine  
28 outpatient.

23 Id.

24 The second proposed subclass, Subclass 2, "consists of those  
25 individuals whose Scoring Forms contained blank dimensions." Mot.  
26 at 7. Plaintiffs contend that, for some of Aetna's insureds,  
27 "these blanks made the difference between reimbursement or not."

28 Id. Plaintiffs propose that Grace, Mariah, and their parents

1 represent subclass 2, since there are blanks on Grace and Mariah's  
2 LOCAT Scoring Forms.<sup>4</sup> The denial letters Aetna sent to Grace and  
3 Mariah are substantially similar to the denial letter sent to  
4 Emily. See Mot. Exs. 4, 5, 6.

5  
6 **III. LEGAL STANDARD**

7 "The class action is an exception to the usual rule that  
8 litigation is conducted by and on behalf of the individual named  
9 parties only." Wal-Mart Stores, Inc. v. Dukes, -- US --, 131 S.  
10 Ct. 2541, 2550 (2011) (internal quotations and citations omitted).  
11 "In order to justify a departure from that rule, a class  
12 representative must be part of the class and possess the same  
13 interest and suffer the same injury as the class members." Id.  
14 (internal quotations and citations omitted).

15 Under Rule 23(a), four prerequisites must be satisfied for  
16 class certification:

17 (1) the class is so numerous that joinder of all members  
18 is impracticable;

19 (2) there are questions of law or fact common to the  
20 class;

21 (3) the claims or defenses of the representative parties  
22 are typical of the claims or defenses of the class; and

23 (4) the representative parties will fairly and adequately  
24 protect the interests of the class.

25 <sup>4</sup> In their reply brief, Plaintiffs clarify that they are seeking an  
26 injunction on behalf of Subclass 2 that would require Aetna to fill  
27 in the sub-dimensions left blank. Reply at 27. Aetna would  
28 presumably need to re-tabulate the class members' LOCAT scores  
pursuant to the proposed injunction, and where the new score  
justified a different level of care, Aetna could be required to  
cover additional costs. See Mot. at 21.

1 Fed. R. Civ. P. 23(a).

2 A plaintiff also must satisfy one or more of the separate  
3 prerequisites set forth in Rule 23(b): (1) there is a risk of  
4 substantial prejudice from separate actions; (2) declaratory or  
5 injunctive relief benefiting the class as a whole would be  
6 appropriate; or (3) common questions of law or fact predominate and  
7 the class action is superior to other available methods of  
8 adjudication. Fed. R. Civ. P. 23(b).

9 "Rule 23 does not set forth a mere pleading standard. A party  
10 seeking class certification must affirmatively demonstrate his  
11 compliance with the Rule -- that is, he must be prepared to prove  
12 that there are in fact sufficiently numerous parties, common  
13 questions of law or fact, etc." Dukes, 131 S. Ct. at 2551  
14 (emphasis deleted). Analysis of these factors "generally involves  
15 considerations that are enmeshed in the factual and legal issues  
16 comprising the plaintiff's cause of action." Id. at 2552 (internal  
17 quotations and citations omitted). "Nor is there anything unusual  
18 about that consequence: The necessity of touching aspects of the  
19 merits in order to resolve preliminary matters, e.g., jurisdiction  
20 and venue, is a familiar feature of litigation." Id.

21  
22 **IV. DISCUSSION**

23 The Court finds that Plaintiffs have failed to establish  
24 commonality per Rule 23(a)(2) because Plaintiffs' claims are  
25 predicated on medical necessity determinations that are unique to  
26 each individual class member. To determine whether a particular  
27 class member is eligible for RTC care, or any other level of care,  
28 the Court would need to the review medical records and other

1 information specific to that member. Such individualized, claim-  
2 specific inquires are not amenable to class-wide resolution.

3 Plaintiffs attempt to sidestep this issue by focusing on  
4 Aetna's use of the LOCAT Scoring Form. Plaintiffs argue that Aetna  
5 employed a common, improper practice of tabulating class members'  
6 LOCAT scores. Thus, Plaintiffs reason that the Court need only  
7 address a few common questions concerning the appropriate method  
8 for tabulating LOCAT scores. The problem with Plaintiffs' position  
9 is that medical necessity determinations do not turn on LOCAT  
10 scores alone. According to Dr. Friedlander, LOCAT scores do not  
11 replace clinical judgment. The evidence bears this out. Aetna has  
12 pointed to a number of cases in which patients were approved for  
13 RTC or other treatment, despite having a LOCAT score that did not  
14 justify coverage for that level of care. See, e.g., Friedlander  
15 Supp. Decl. Ex. A at 17-18.

16 Plaintiffs contend that Dr. Friedlander has testified that  
17 LOCAT is the only criteria Aetna uses to make medical necessity  
18 determinations. See Mot. at 11. Dr. Friedlander did state that  
19 Aetna applies LOCAT criteria to all insureds seeking coverage for  
20 behavioral health claims. See Mot. Ex. 1 ("Friedlander Dep.") at  
21 31, 46. However, Dr. Friedlander also testified that LOCAT was  
22 used "[a]s a guideline in addition to clinical judgment." Id. at  
23 30. In fact, during his deposition, Dr. Friedlander stressed the  
24 importance of clinical judgment more than once. Id. at 48 (in  
25 making coverage determinations, Aetna clinicians will "review th[e]  
26 medical records, apply LOCAT criteria, apply clinical judgment, and  
27 make a determination . . . ."). Plaintiffs argue that Aetna was  
28 "doing everything it could" to incorporate relevant aspects of

1 clinical judgment into LOCAT. Reply at 6. That may be so, but  
2 that does not mean that LOCAT replaced clinical judgment  
3 altogether.

4 The Court does not mean to imply that LOCAT is irrelevant to  
5 coverage determinations. To the contrary, much of the evidence  
6 presented in connection with the instant motion suggests that a  
7 member's LOCAT score is strongly correlated with the level of care  
8 approved by Aetna. However, a classwide proceeding on Aetna's  
9 LOCAT scoring practices would not "generate common answers apt to  
10 drive resolution of the litigation," since coverage determinations  
11 ultimately turn on the medical necessity of the treatment proposed.  
12 See Dukes, 131 S. Ct. at 2551 (quotations omitted). Thus, even if  
13 the Court were to agree with Plaintiff's proposed method of  
14 tabulating LOCAT scores, and even if this method resulted in higher  
15 LOCAT scores for some of Aetna's members, Aetna could still refuse  
16 to provide those members with coverage on medical necessity  
17 grounds. An inquiry into Aetna's method of tabulating LOCAT scores  
18 might be probative of medical necessity and Plaintiffs' entitlement  
19 to coverage, but it is not dispositive.

20 Plaintiffs argue that Aetna's pre-litigation correspondence  
21 indicates that Aetna denied Plaintiffs' claims for RTC care based  
22 not on medical necessity, but on Plaintiffs' failure to meet LOCAT  
23 criteria. Reply at 8. Plaintiffs reason that Aetna may not now  
24 raise medical necessity as an additional reason for a denial. Id.  
25 Plaintiffs are correct that an ERISA plan administrator forfeits  
26 the right to assert medical necessity as the basis for the denial  
27 of a claim when it fails to raise that issue during the  
28 administrative process. See Harlick v. Blue Shield, 686 F.3d 699,

720-21 (9th Cir. 2012). However, Aetna did cite medical necessity as the reason for denying Plaintiffs' claims, even if Aetna did not use those exact words. Aetna's denial letters to Plaintiffs state: "Treatment of this member could be provided at a lower level of care, or in another setting, e.g., partial hospitalization, intensive outpatient, or routine outpatient." Mot. Exs. 4, 5, 6. As Plaintiffs point out, these denial letters also state that the named patients' clinical conditions did not meet LOCAT guidelines for residential treatment. But this language merely shows that Aetna utilized LOCAT to arrive at the conclusion that treatment could be provided at a lower level of care.

In sum, the Court finds that Plaintiffs' class claims turn not only on the appropriate method for tabulating LOCAT scores but also on individualized questions concerning clinical judgment and medical necessity. As such, Plaintiffs' claims are not amenable to class-wide resolution.

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs Dennis F., Carol F., Grace F., Mark P., Kestrel P., Maura T., Edward T., Emily T., Ed L., and Mindy L.'s motion for class certification is DENIED.

IT IS SO ORDERED.

Dated: September 25, 2013

  
UNITED STATES DISTRICT JUDGE